Supreme Court, U.S.
FILED

No.

00-495 JUN 20 2000

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

ARTURO C. ALDERETTE,
Petitioner,

v.

ERNIE ROE, WARDEN,
Respondent.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

Arturo C. Alderette #H-40595
C.S.P. – L.A.C. A2-231
44750 60th Street West
Lancaster, CA 93536
No Phone / In Pro Se

43pp

QUESTION(S) PRESENTED

1. Should the denial of a Certificate of Appealability by the Ninth Circuit Court of Appeal been resolved in a different manner than the one followed by the Eastern District Court of California?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

Bill Lockyer, Attorney General of the state of California

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts**:
The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[x] unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is

[x] unpublished.

For cases from **State Courts**:
The opinion of the highest State Court to review the merits appears at Appendix E to the petition and is

[x] unpublished.

The opinion of the California Courts of Appeal appears at Appendix D to the petition and is

[x] unpublished.

The opinion of the Superior Court of California appears at Appendix C to the petition and is
[x] unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 24, 2000.

[x] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[x] For cases form **state courts**:

The date on which the highest state court decided my case was May 26, 1999. A copy of that decision appears at Appendix E.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VIII.

Amendment XIV.

28 U.S.C. §2253, Subdivision (c) (2)

California Health & Safety Code, §11351

California Health & Safety Code, §11352, Subdivision (b)

California Health & Safety Code, §11370.2

California Health & Safety Code, §11370.4

California Penal Code, §182

California Penal Code, §667.5, Subdivision (b)

California Penal Code, § 12022, Subdivision (a)(1)

California Penal Code, §12022, Subdivision (c)

STATEMENT OF THE CASE

On October 28, 1996, petitioner, Arturo C. Alderette, was found guilty following a jury trial of one count of transportation for sale of cocaine between non-contiguous counties, in violation of *Health & Safety Code, §11352(b)*; one count of possession of cocaine for sale, in violation of *Health & Safety Code, §11351*; and one count of conspiracy to commit a crime, the transportation and/or possession of cocaine, in violation of *Penal Code, §182.* (CT 124).[1]

The jury also found true the following special allegations: that petitioner was personally armed with a gun, pursuant to *Penal Code, §12022(c)* (counts one and two); that a principle was armed during the commission of the offense, pursuant to *Penal Code, §12022(a)(1)*; that the illegal substance included exceeded one kilogram in weight, pursuant to *Health & Safety Code, §11370.4(a)*; and that petitioner had been convicted of a violation of a violation of *Health & Safety Code, §11351*, on July 7, 1992, within the meaning of both *Health & Safety Code §11370.2* and *Penal Code, §667.5(b).* (CT 17, 18)

At his December 10, 1996, sentencing hearing, the court sentenced petitioner on the transportation to a non-contiguous county conviction to an aggravated state prison term of nine years. (CT 160.) The court imposed consecutive terms on all of the following enhancements: a three-year term for the *Health & Safety Code, §11370.2*; a one-year term for the same prior pursuant to *Penal Code, §667.5(b)*; a mid-term of four years on the armed enhancement pursuant to *Penal Code, §12022(c)*; and a three-year term due to the drug weight enhancement. (CT 161.)

Petitioner was given a total of 471 days in-custody credit. (CT 161.)

A Notice of Appeal was filed on December 10, 1996. (CT 162.)

Petitioner's Direct Appeal was affirmed in the California Courts of Appeal and the California Supreme Court denied petitioner's Petition For Review.

Petitioner is not citing any decision about the two courts

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[1] "CT" refers to "Clerk's Transcripts."

mentioned above because the issues that were raised on direct appeal and in the Petition For Review were not raised in the lower federal courts.

Then, after the California Supreme Court denied petitioner's Petition For Review, petitioner filed a state habeas petition in the trial court alleging that his sentence violated the *8th and 4th Amendments* to the *United States' Constitution* because he received more time than the principal offender, which was denied by the trial court on May 26, 1999 (Appendix C), the Court of Appeal for the First Appellate District of California denied the petition on January 14, 1999 (Appendix D), and the California Supreme Court denied the same on May 26, 1999. (Appendix E.)

On June 20, 1999, petitioner filed a federal habeas corpus petition in the Eastern District of Court of California, raising the same issue, that his sentence violated the *8th and 14th Amendments, United States Constitution*, because he received more time than the principal offender. The Eastern District Court of California denied that petition on November 1, 1999. (Appendix B, pp. 4 – 24.)

On November 17, 1999, petitioner filed his Notice of Appeal along with a Petition for Issuance of Certificate of Appealability and the Eastern District of California denied it on December 3, 1999, because petitioner had failed to show the denial of a constitutional right. *(28 U.S.C. §2253(c)(2).)* (Appendix B, pp. 1–3.)

Finally, on December 12, 1999, petitioner filed a Petition for Issuance of Certificate of Appealability in the Ninth Circuit Court of Appeals and it was denied on March 24, 2000. (Appendix A.)

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari should be granted for two compelling reasons. First, the decision below conflicts with a relevant decision of this Court in *Lozada v. Deeds*, 498 U. S. 430 (1991), as to the issuance of Certificate of Probable Cause/Certificate of Appealability.

Secondly, in denying petitioner's certificate of appealability, the appellate court has so far departed from this Court's mandate in *Lozada v. Deeds*, 498 U. S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), that exercise of this Court's supervisory power is required.

I

THE DECISION BELOW CONFLICTS WITH *LOZADA V. DEEDS*, 498 U. S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), AS TO THE ISSUANCE OF CERTIFICATE OF PROBABLE CAUSE/CERTIFICATE OF APPEALABILITY

The federal habeas corpus petition originally alleged that petitioner's sentence violated the *Eighth* and *Fourteenth Amendments to the United States Constitution* (Appendix B) and it was denied by the Eastern District Court of California because petitioner allegedly failed to show a constitutional violation and thereby denied petitioner's certificate of appealability for failure to show a denial of a constitutional right.

The Ninth Circuit Court of Appeal denied petition a certificate of appealability by citing only *28 U.S.C. § 2253(c)(2)*, which, by implication, the denial was for petitioner's failure to show a denial of a constitutional right. (Appendix A.)

The Eastern District Court of California rested its denial of certificate of appealability on *28 U.S.C. § 2253(c)(2)* (Appendix B), and that was presumably the basis for the court of appeals' decision to deny a certificate of appealability, which is contrary and in conflict with this Court's decision in *Lozada v. Deeds*, 498 U. S. 430, 111 S. Ct. 860, 112 L. Ed. 2d 956 (1991), where this Court held in *Lozada*:

"The denial of the right tot appeal could be resolved

in a different manner than the one followed by the District."

Now, petitioner contends that even though this Court, in *Lozada,* was making a decision as to the certificate of probable cause is also applicable in the instant case, because the new requirement of a certificate of appealability (COA) appears to make no significant change in the standard applicable to the former requirement of the certificate of probable cause (CPC.) Section 102 of the *Antiterrorism and Effective Death Penalty Act (*hereinafter *AEDPA)* provides that a COA may be issued only upon a "substantial showing of a denial of a constitutional right." (*28 U.S.C. § 2253(c)(2).)*

This Court had previously characterized the standard for the former CPC as a "substantial showing of a denial of [a] federal right." *Barefoot v. Estelle,* 463 U. S. 880 (1983) (quoting *Stewart v. Beto,* 454 F.2d 268, 270 n. 2 (5th Cir. 1990), cert. denied, 406 U.S. 925 (1972); see *Rodriguez v. Scully,* 905 F.2d 24 (2d Cir. 1990) (CPC requires a non-frivolous issue "deserving of appellate review".) Thus, the operative words "substantial showing" are identical with respect to both the former CPC and the current COA. The fact that a COA is available only with respect to "constitutional" right, whereas a CPC was stated to be available with respect to a "federal" right is, in the context of a habeas petition under *28 U.S.C. § 2254,* a distinction without a difference since the writ may issue upon the petition of a state prisoner only for a denial of a constitutional right. See *Herrera v. Collins,* 506 U.S. 390 (1993).

Now, this Court must agree with the Second and Tenth Circuits, see *Reyes v. Keane,* 90 F.2d 676 680 (2nd Cir. 1996); *Lennox v. Evans,* 87 F.3d 431, 434-35 (10th Cir. 1996), as to the substantive standard for a COA is the same as the standard for the prior CPC.

Therefore, this Court should reverse the Ninth Circuit's decision as to petitioner's certificate of appealability to resettle the principle that was settled in *Lozada, supra,* and since petitioner, in his original habeas corpus petition which was filed in the Eastern District of California has alleged that his constitutional rights under the *Eighth* and *Fourteenth*

Amendments were violated, the Ninth Circuit should have resolved the certificate of appealability in a different manner than the one followed by the Eastern District of California, *Lozada, supra.* Also see *Gideon v. Wainwright*, 372 U.S. 335 (1963), where this Court recognized that the *Eighth Amendment's* ban on cruel and unusual punishment is made obligatory on the states through the *Fourteenth Amendment*, citing *Robinson v. California*, 370 U. S. 660, reh. denied, 371 U. S. 905 (1962).

II
THE NINTH CIRCUIT HAS SO FAR DEPARTED FROM THIS COURT'S MANDATE IN *LOZADA V. DEEDS*, 498 U. S. 430, THAT EXERCISE OF THIS COURT'S SUPERVISORY POWER IS REQUIRED

After this Court's holding in *Lozada v. Deeds*, 498 U. S. 430 (1991), there remained no doubt that when a Circuit Court faces a request for a certificate of probable cause/certificate of appealability, the Circuit Court should resolve the problem in a different manner than the one followed by the District Court, *Lozada, supra.* In other words, this Court held that the presence or absence of a constitutional right violation, the right to appeal can only be taken away after the Circuit Court rules on a certificate of probable cause/certificate of appealability by resolving the problem in a different manner than the one followed by the Eastern District Court of California's basis in denying petitioner's certificate of appealability by citing *28 U.S.C. § 2253(c)(2).* However, the holding in *Lozada* mandates that "the Circuit Courts must resolve the certificate of appealability in a different manner than the one followed by the District Courts." *Id.* at 432.

The mere denial of petitioner's certificate of appealability by the Ninth Circuit by just citing *28 U.S.C. § 2253(c)(3),* was insufficient to deny petitioner's right to appeal as to his constitutional rights. Indeed, that questions presented by petitioner in his request of certificate of appealability to the Ninth Circuit were not even addressed in the Ninth Circuit's decision (Appendix B) and therefore this court, should

reverse this case and remand this case to the Ninth Circuit for a proper decision consistent with *Lozada's* holding.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,

Arturo C. Alderette, Declarant

Date: August 22, 2000